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No. 80-1874

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

*Petitioner,*

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## JOINT APPENDIX

CHARLES S. SIMS,
*Counsel of Record*
BRUCE J. ENNIS, Jr.
JOEL M. GORA
E. RICHARD LARSON
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

STEVEN R. SHAPIRO
New York, New York

AVIAM SOIFER
Cambridge, Massachusetts

*Counsel for Petitioner*

JEFFREY H. KLINK,
*Counsel of Record*
Mahoney, Hadlow & Adams
800 Barnett Bank Building
100 Laura Street
P.O. Box 4099
Jacksonville, Florida 32201
(904) 354-1100

MITCHELL D. FRANKS
Dept. of Legal Affairs
Office of the Attorney General
Suite 1501
The Capitol
Tallahassee, Florida 32301
(904) 488-1573

*Counsel for Respondents*

Petition for Certiorari Filed May 7, 1981
Certiorari Granted October 5, 1981

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

GEORGIA PATSY

v.

BOARD OF REGENTS
of the State of Florida,
No. 79-732-CIV-JAG

RELEVANT DOCKET ENTRIES

| | | |
|---|---|---|
| 1. | Complaint. ($500,000.00+). | Feb. 7, 1979 |
| 5. | Motion to dismiss complaint (Deft). | Mar. 5, 1979 |
| 6. | Memo of law in support of above motion. (Deft). | Mar. 5, 1979 |
| 9. | Memo in opposition to deft's motion to dismiss. (Pltf). | Mar. 12, 1979 |
| 11. | ORDER: Deft's motion to dismiss complaint GRANTED. Pltf have 20 days from date of order to file w/court amended complaint | Apr. 9, 1979 |
| 12. | Amended Complaint. | Apr. 19, 1979 |

RELEVANT DOCKET ENTRIES

| | | |
|---|---|---|
| 14. | Motions to dismiss amended complaint & alternative motion for a more definite statement. (Deft Fla. Board of Regents) | June 14, 1979 |
| 15. | Memo in support of above motion. (Deft. Fla. Board of Regents) | June 8, 1979 |
| 17. | Memo in opposition to deft's motion to dismiss. (Pltf). | June 11, 1979 |
| 18. | ORDER: Deft's motion to dismiss GRANTED for pltf's failure to exhaust administrative remedies. (7/9/79-JAG)M-7/25/79. | July 9, 1979 |
| 19. | NOTICE OF APPEAL filed by pltf from Order dismissing pltf's complaint entered 7/9/79. | July 26, 1979 |
| 20. | COST BOND ON APPEAL in amount of $250.00 deposited w/registry of Court by pltf/appellant. | July 26, 1979 |

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2965

| | |
|---|---|
| Brief for Appellant filed | Oct. 9, 1979 |
| Brief for Appellee filed | Nov. 14, 1979 |
| Reply Brief for Appellant filed | Dec. 4, 1979 |
| Opinion, Reversed and Remanded | Feb. 28, 1980 |
| Appellee's Petition for Rehearing En Banc filed | Mar. 17, 1980 |
| Order for Rehearing En Banc | May 5, 1980 |
| Brief for Appellant filed | May 21, 1980 |
| Brief for Appellee filed | June 9, 1980 |
| Opinion, Vacated and Remanded | Jan. 22, 1980 |

[CAPTION]

Complaint

COMES NOW, GEORGIA PATSY, Plaintiff herein, by and through her undersigned counsel, complaining of the above Defendant and for cause of action would respectfully show unto the Court as follows:

I.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1343(3) which provides for original jurisdiction of this Court in all actions authorized by 42 U.S.C., Section 1983 to redress the deprivation under color of law of any right, privilege or immunity secured by the Constitution of the United States, specifically the Fifth, Ninth and Fourteenth Amendments.

II.

PRELIMINARY STATEMENT

2. GEORGIA PATSY, a white female American and an employee of the above captioned University, seeks redress for discrimination due to her race, suffered by her in violation of the Constitution and the laws of the United States. Specifically, Plaintiff alleges she has been denied employment opportunities for which she is well qualified within the above captioned University, while there has been an intentional and concerted effort by the University to promote and hire minorities to available positions for which Plaintiff has applied.

III.

PARTIES

3. GEORGIA PATSY, Plaintiff, is a citizen of the United States and a resident of the Southern District of Florida. Plaintiff is employed by FLORIDA INTERNATIONAL UNIVERSITY and has attained permanent status within the personnel system of the State of Florida.

4. The Defendant, FLORIDA INTERNATIONAL UNIVERSITY, is a Division of the State University of Florida and it possesses and exercises all powers necessary for the maintenance of an upper level university.

IV.

STATEMENT OF CLAIM

5. On June 1st, 1972, Plaintiff began employment as a Clerk Typist III, with Defendant University, and is presently classified as a Secretary III.

6. Plaintiff's education consists of a Bachelor of Education Degree (cum laude) from the University of Miami and a Master of Science Degree in Administration and Supervision of Adult Education from Florida International University. Plaintiff has had continuing teaching experience in the Dade County, Florida, Adult Education Program.

7. During the six (6) years while Plaintiff has been employed at the Defendant University, she has applied for numerous employment openings within the Defendant University and has been uniformly rejected with many Latins and non-whites having been selected in place of the Plaintiff.

8. The following is a partial list of available positions advertised by the Defendant for which Plaintiff applied for, but was rejected:

Position with Career Development and Placement Department

Interim Counselor in School Education

Liason Officer and Student Affairs Coordinator

Continuing Education Coordinator

Coordinator/Director Alumni Affairs

Vocational Counselor II

Personnel Aide

College Work-Study Coordinator

Conference Coordinator

University Public Functions Manager

Financial Aid Counselor

Student Affairs Coordinator

Admissions Counselor

9. The former President of FLORIDA INTERNATIONAL UNIVERSITY, Charles Perry has recognized that Plaintiff's background qualifies her for a higher position than the Secretary III position then and now held. See Exhibit "A" attached hereto and made a part hereof.

10. The professional skill and management abilities of the Plaintiff have been recognized by the Head of the Department of Psychology at FLORIDA INTERNATIONAL UNIVERSITY. See Exhibit "B" attached hereto and made a part hereof.

11. The Performance Appraisal conducted annually in accordance with the State of Florida Personnel System shows the Plaintiff to be outstanding, not only with respect to her assigned tasks, but innovative, resourceful, efficient and functioning more as a Staff Assistant than

as a Secretary. See Exhibit "C" (composite) attached hereto and made a part hereof.

11(a). The Defendant has engaged in employment practices which have discriminated against Plaintiff on the basis of her race and/or sex in the promotion of its employees.

12. The Defendant has maintained and continues to maintain a policy of preference to minority applicants for both available administrative and non-administrative positions which results in discrimination against the Plaintiff, a white-female, contrary to the Constitution and laws of the United States.

13. FLORIDA INTERNATIONAL UNIVERSITY has continually sought out individuals from minority groups to fill positions resulting in discrimination against the Plaintiff, contrary to the Constitution and laws of the United States. See Exhibits "D" and "E" attached hereto and made a part hereof.

14. FLORIDA INTERNATIONAL UNIVERSITY through its agents, deceived Plaintiff into believing that she was being considered for a position she applied for when in reality, Plaintiff's name had not been submitted as one of the final candidates for the position of Interim Counselor. See Exhibit "F" (composite) attached hereto and made a part hereof.

15. FLORIDA INTERNATIONAL UNIVERSITY not only rejected Plaintiff for positions for which she was qualified and had applied, but rejected Plaintiff for a position for which she had not applied. See Exhibit "G" attached hereto and made a part hereof.

16. FLORIDA INTERNATIONAL UNIVERSITY as further evidence of its discriminatory policies maintains files on qualified applicants for positions by segregating them as follows: White, Black, Male, and Female, contrary to Federal law and Equal Employment guidelines.

16(a). The acts and practices by the Defendant described in this complaint constitute a pattern and practice of resistance to the full enjoyment of the right to equal employment opportunities without distinction based on race and/or sex and such acts and practices are intended to deny the full exercise of rights secured by the Constitution and laws of the United States.

17. An actual controversy exists between the Plaintiff and Defendant in that Plaintiff contends that the actions of FLORIDA INTERNATIONAL UNIVERSITY are in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff is in doubt as to her status and rights under the Constitution of the United States and seeks a declaration of the legal and constitutional rights of the parties with respect to the subject matter of this action.

18. Plaintiff will continue to suffer immediate and irreparable injury, loss of damage unless this Court grants the injunctive relief sought. There is no plain, adequate or speedy remedy at law to redress these deprivations.

V.

CLAIMS FOR RELIEF

19. There exists between the parties an actual controversy as heretofore set out. The Plaintiff is suffering and is threatened with immediate and irreparable injury as a result of the actions of the Defendant stated above. The Plaintiff has no plain nor adequate remedy at law to redress the wrongs and unlawful conduct complained of herein. FLORIDA INTERNATIONAL UNIVERSITY has severly damaged Plaintiff by its discriminatory practices and has painfully stigmatized Plaintiff, and continues to do so. By the actions of FLORIDA INTERNATIONAL UNIVERSITY, Plaintiff has been discriminated against and denied due process of law in violation of

her rights under the Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The Defendant has acted in violation of Title 42, U.S.C., Section 1983, to inflict said deprivations on the Plaintiff.

WHEREFORE, Plaintiff prays this Honorable Court to enter the following relief:

A. Assume jurisdiction of this cause;

B. Enter a final judgment pursuant to 28 U.S.C., Section 2201, and Rule 57, of the Florida Rules of Civil Procedure declaring that the Plaintiff has suffered from acts of discrimination at the hands of the Defendant or its agents, contrary to the Due Process Clause of the Fourteenth Amendment;

C. Require Defendant to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendant to pay to the Plaintiff

the sum of $500,000 as actual and exemplary damages;

D. Assess all costs against the Defendant and award the same to the Plaintiff;

E. Award attorney's fees to the Plaintiff;

F. That the Court order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF EUGENE P. SPELLMAN
Attorneys for Plaintiff,
GEORGIA PATSY
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

By: /s/
DENIS DEAN, SR.

By: /s/
EUGENE P. SPELLMAN

[CAPTION]

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, the defendant, Florida International University (hereafter "FIU"), respectfully moves this Honorable Court to dismiss the complaint against it for the following reasons:

1. The Court lacks subject matter jurisdiction because the defendant is not a "person" under 42 U.S.C. § 1983.

2. The defendant lacks the legal capacity to be sued.

WHEREFORE, FIU respectfully requests this Honorable Court to dismiss plaintiff's complaint against it with prejudice, and award FIU a reasonable attorney's fees.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiff, a white female clerical employee at Florida International University ("FIU"), has sued FIU under 42 U.S.C. § 1983 alleging "reverse discrimination" regarding alleged promotion opportunities. (Complaint, ¶¶ 1, 11(a), 19) Plaintiff has also filed a motion to transfer this matter to the Honorable Judge Eaton on the grounds that he already has another "reverse discrimination" suit against FIU pending before him.

For the reasons discussed below, it is clear that the complaint against FIU should be dismissed with prejudice. Accordingly, the requested dismissal, if granted, would moot the motion to transfer.

## ARGUMENT

### I. THIS COURT SHOULD DISMISS THE COMPLAINT AGAINST FIU BECAUSE IT IS NOT A "PERSON" WITHIN THE MEANING OF 42 U.S.C. § 1983.

The courts have consistently held that states and their agencies are not "persons" within the meaning of 42 U.S.C. § 1983. Vick v. Texas Employment Commission, 514 F.2d 734 (5th Cir. 1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974). In addition, the courts have also consistently held that state universities and their governing Board of Regents are state agencies, and thus not "persons" within the meaning of Section 1983. Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976), cert. denied, 421 U.S. 952, aff'd on other grounds, 430 U.S. 651 (1977); Blanton v. State University of New York, 489 F.2d 377, 382 (2d Cir. 1973).

The recent U.S. Supreme Court decision of Monell v. Dept. of Social Services, ___ U.S. ___, 56 L.Ed. 2d 611 (1978) has not overruled these decisions with respect to state agencies being

considered "persons" under § 1983. In Monell, the United States Supreme Court held that local governments, municipal corporations, and/or local independent school boards are "persons" subject to liability under 42 U.S.C. § 1983. 56 L.Ed. 2d at 618. The Supreme Court also overruled Monroe v. Pope, 365 U.S. 167 (1967), but only insofar as it had completely immunized municipalities from suit under § 1983. Id. at 619. The Supreme Court explicitly noted that its holding was "limited to local government units which are not considered part of the State" for Eleventh Amendment purposes. (Emphasis added) Id. at 635 n. 54.

Thus, a fair reading of the Monell decision can only lead to the conclusion that it is limited to local government units that are not considered part of the state. The Fifth Circuit in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) has recently noted that the holding in Monell is so limited:

> The plaintiff contends that the recent Supreme Court decision in [Monell] . . . has abrogated the state's eleventh amendment immunity when it is sued pursuant to 42 U.S.C. § 1983. Nothing in Monell, however, goes that far. The Supreme Court explicitly noted that its Monell holding was "limited to local government units which are not considered part of the state for eleventh amendment purposes."

586 F.2d 399 at 410 (5th Cir. 1978).

In sum, the defendant FIU, as a state agency, is not considered to be a "person" within the meaning of § 1983. See Aldredge v. Turlington, TCA 78-0830, Order dated January 25, 1979 (N.D. Fla.) (A copy of this Order is attached). Therefore, the complaint against FIU should be dismissed with prejudice for lack of subject matter jurisdiction.

II. THIS COURT SHOULD DISMISS THE COMPLAINT AGAINST FIU BECAUSE IT LACKS THE CAPACITY TO BE SUED.

Pursuant to Rule 17(b), Federal Rules of Civil Procedure, defendant FIU's capacity to be sued is determined by Florida law. Byron

v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975). Under Florida law the individual public universities which comprise the State University System, including FIU, see Fla. Stat. §§ 239.01, 239.02, lack separate corporate existence and the capacity to be sued. Accordingly, the Court should dismiss FIU as a party defendant. Byron, supra, 403 F. Supp. at 54.

## CONCLUSION

For the preceding reasons, defendant FIU respectfully requests this Honorable Court to dismiss the complaint against it with prejudice, and award FIU a reasonable attorney's fee, pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 3220
(904) 354-1100

JOHN W. KOZYAK
Mahoney Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

LAB12/G

[CAPTION]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

In spite of the decision in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), it is still an unsettled question as to whether or not a "State" and/or one of its agencies or departments is considered a "person" for jurisdictional purposes under the Civil Rights Act, Title 42 U.S.C., Section 1983. There is no question but that Bogard takes the position that Monell v. Dept. of Social Services, 436 U.S. ___, 98 S.Ct. 2018 (1978) continues to preclude civil rights suits against State or their departments while at the same time permitting suits against "local government units". A close reading of Monell indicates no such limitation.

Mr. Justice Brennan, in footnote number 53 stated the following:

> "Since there is nothing in the 'context' of §1 of the Civil Rights Act calling for a restricted interpretation of the word 'person', the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued."

and finally, the Monell concludes with a discussion of the Civil Rights Attorney's Fees Award Act of 1976, allowing attorney's fees to the prevailing party in a 1983 Civil Rights action. The Court pointed out in quoting from the Senate Report on the Bill that defendants in those cases are often states or local bodies and that it was intended that attorney's fees could be collected, if necessary, from the state or local government.

The Court in Monell concluded by stating as follows:

> ". . . there can be no doubt that Section 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed against, all forms of official violation of federally protected rights."

It should be noted that the question presented by the Defendant's motion to dismiss is, in effect, not whether or not FLORIDA INTERNATIONAL UNIVERSITY can be sued as a party defendant, but whether or not monetary damages can be obtained against that entity, since the Fifth Circuit Court of Appeals has entertained all actions against political subdivisions except those for money damages. Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970) cert. den. 400 U.S. 991, 91 S.Ct.451; Butts v. Dallas Independent School Dist., 436 F.2d 728 (5th Cir. 1971).

The Plaintiff herein has asked for money damages in the claim for relief only as an alternative to injunctive and equitable relief and clearly if this Court is of the opinion that monetary damages could not be assessed against the Defendant, this Court has the authority to strike the claim for monetary

damages and permit the case to proceed solely on the injunctive and equitable relief sought.

The Defendant takes the position that the Supreme Court decision in Monell overrules Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) only insofar as Monroe had completely immunized municipalities from suit under Section 1983. Whether that analysis is correct or not, it should be noted that in the seventeen years during the existence of Monroe v. Pape and prior to the Monell decision, Monroe v. Pape was interpreted only as outlawing actions for monetary damages against states and municipal corporations. Adams v. Park Ridge, 293 F.2d 585 (7th Cir. 1961); United States v. Clark, 249 F.Supp. 720 (DC Ala. 1965).

Counsel for the Defendant have cited no cases to this Court and, in fact, none exist prohibiting injunctive relief against a state or one its agencies and to the contrary, in addition to the above cited authorities it is

quite clear that states are subject to suit for injunctive and declaratory relief. Gates v. Collier, 559 F.2d 241 (5th Cir. 1977). Therefore, this Court should deny Defendant's motion to dismiss and permit this cause to proceed to a determination of the merits.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF EUGENE P. SPELLMAN
Attorneys for Plaintiff, GEORGIA PATSY
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

By /s/
DENIS DEAN, SR.

[CAPTION]

ORDER

THIS CAUSE came before the Court on Defendant's Motion to Dismiss the Complaint on substantive and procedural grounds. After due consideration, the Court finds the Complaint must be dismissed for its failure to join the proper Defendant to this action.

State law determines the capacity of an individual, corporation or other entity to sue and be sued. Rule 17(b), Fed. R. Civ. P. Florida Interational University is an institution which is part of the state university system. Fla. Stat. §239.01 (1977). The Board of Regents of the Division of Universities of the Department of Education is a corporate body with the power and capacity to sue and be sued. Fla. Stat. §240.042 (1977). No state university, in its individual capacity, is granted such power. "Under Florida law the University

is not endowed with the authority to be sued in its own name. Rather, these characteristics are bestowed upon the Board of Regents, as head of the State's University System." Byron v. University of Florida, 403 F. Supp. 49, 54 (N.D. Fla. 1975). Accordingly, the Court finds Florida International University not to be the proper party Defendant in this cause.

It is thereupon

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be and the same is hereby GRANTED and it is further

ORDERED AND ADJUDGED that Plaintiff shall have TWENTY (20) days from the date of this Order in which to file with the Court an Amended Complaint.

DONE and ORDERED in Chambers at

F. Supp. 49, 54 (N.D. Fla. 1975). Accordingly, the Court finds Florida International University not to be the proper party Defendant in this cause.

It is thereupon

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be and the same is hereby GRANTED and it is further

ORDERED AND ADJUDGED that Plaintiff shall have TWENTY (20) days from the date of this Order in which to file with the Court an Amended Complaint.

DONE and ORDERED in Chambers at Miami, Florida, this 9th day of April, 1979.

/s/
UNITED STATES DISTRICT COURT JUDGE

copies: Eugene P. Spellman, Esq.

Guy O. Farmer, II, Esq.
Jeffrey H. Klink, Esq.

Miami, Florida, this 9th day of April, 1979.

/s/
UNITED STATES DISTRICT COURT JUDGE

copies: Eugene P. Spellman, Esq.

Guy O. Farmer, II, Esq.
Jeffrey H. Klink, Esq.

[CAPTION]

AMENDED COMPLAINT

COMES NOW, GEORGIA PATSY, Plaintiff herein, by and through her undersigned counsel, complaining of the above Defendants and for cause of action would respectfully show unto the Court as follows:

I.

JURISDICTION

1. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for original jurisdiction of this Court in all actions authorized by 42 U.S.C. §1983 to redress the deprivation under color of law of any right, privilege or immunited secured by the Constitution of the United States, specifically the Fifth, Ninth, and Fourteenth Amendments.

II.

PRELIMINARY STATEMENT

2. GEORGIA PATSY, a white female American and an employee of the above captioned University, seeks redress for discrimination due to her race, suffered by her in violation of the Constitution and the laws of the United States. Specifically, Plaintiff alleges she has been denied employment opportunities for which she is well qualified within the above captioned University, while there has been an intentional and concerted effort by the University to promote and hire minorities to available positions for which Plaintiff has applied.

III.

PARTIES

3. GEORGIA PATSY, Plaintiff, is a citizen of the United States and a resident of the Southern District of Florida. Plaintiff is employed by FLORIDA INTERNATIONAL UNIVERSITY

and has attained permanent status within the personnel system of the State of Florida.

4. The Defendant, BOARD OF REGENTS, of the State of Florida is a corporate body, head of the State's University System, of which FLORIDA INTERNATIONAL UNIVERSITY is an institution part of that system.

IV.

STATEMENT OF CLAIM

5. On June 1st, 1972, Plaintiff began employment as a Clerk Typist III, with FLORIDA INTERNATIONAL UNIVERSITY and is presently classified as a Secretary III.

6. Plaintiff's education consists of a Bachelor of Education Degree (cum laude) from the University of Miami and a Master of Science Degree in Administration and Supervision of Adult Education from FLORIDA INTERNATIONAL UNIVERSITY. Plaintiff has had continuing teaching experience in the Dade County, Florida, Adult Education Program.

7. During the six (6) years while Plaintiff has been employed at FLORIDA INTERNATIONAL UNIVERSITY, she has applied for numerous employment openings within FLORIDA INTERNATIONAL UNIVERSITY and has been uniformly rejected with many Latins and non-whites having been selected in place of the Plaintiff.

8. The following is a partial list of available positions advertised by FLORIDA INTERNATIONAL UNIVERSITY for which Plaintiff applied for, but was rejected:

Position with Career Development and Placement Dept.

Interim Counselor in School Education

Liason Officer and Student Affairs Coordinator

Continuing Education Coordinator

Coordinator/Director Alumni Affairs

Vocational Counselor II

Personnel Aide

College Work-Study Coordinator

Conference Coordinator

University Public Functions Manager

Financial Aid Counselor

Student Affairs Coordinator

Admissions Counselor

9. The former President of FLORIDA INTERNATIONAL UNIVERSITY, Charles Perry, has recognized that Plaintiff's background qualifies her for a higher position than the Secretary III position then and now held. See Exhibit "A" attached hereto and made a part hereof.

10. The professional skill and management abilities of the Plaintiff have been recognized by the Head of the Department of Psychology at FLORIDA INTERNATIONAL UNIVERSITY. See Exhibit "B" attached hereto and made a part hereof.

11. The Performance Appraisal conducted annually in accordance with the State of Florida Personnel System shows the Plaintiff to be outstanding, not only with respect to her assigned tasks, but innovative, resourceful, efficient and functioning more as a Staff Assistant than

as a secretary. See Exhibit "C" (composite) attached hereto and made a part hereof.

11(a). FLORIDA INTERNATIONAL UNIVERSITY has engaged in employment practices which have discriminated against Plaintiff on the basis of her race and/or sex in the promotion of its employees.

12. FLORIDA INTERNATIONAL UNIVERSITY has maintained and continues to maintain a policy of preference to minority applicants for both available administrative and non-administrative positions which results in discrimination against the Plaintiff, a white-female, contrary to the Constitution and laws of the United States.

13. FLORIDA INTERNATIONAL UNIVERSITY has continually sought out individuals from minority groups to fill positions resulting in discrimination against the Plaintiff, contrary to the Constitution and laws of the United States. See Exhibits "D" and "E" attached hereto and made a part hereof.

14. FLORIDA INTERNATIONAL UNIVERSITY through its agents, deceived Plaintiff into believing that she was being considered for a position she applied for when in reality, Plaintiff's name had not submitted as one of the final candidates for the position of Interim Counselor. See Exhibit "F" (composite) attached hereto and made a part hereof.

15. FLORIDA INTERNATIONAL UNIVERSITY not only rejected Plaintiff for positions for which she was qualified and had applied, but rejected Plaintiff for a position for which she had not applied. See Exhibit "G" attached hereto and made a part hereof.

16. FLORIDA INTERNATIONAL UNIVERSITY as further evidence of its discriminatory policies maintains files on qualified applicants for positions by segregating them as follows: White, Black, Male and Female, contrary to Federal law and Equal Employment guidelines.

16(a). The acts and practices by FLORIDA INTERNATIONAL UNIVERSITY described in this complaint constitute a pattern and practice of resistance to the full enjoyment of the right to equal employment opportunities without distinction based on race and/or sex and such acts and practices are intended to deny the full exercise of rights secured by the Constitution and laws of the United States.

17. An actual controversy exists between the Plaintiff and FLORIDA INTERNATIONAL UNIVERSITY, in that Plaintiff contends that the actions of FLORIDA INTERNATIONAL UNIVERSITY are in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff is in doubt as to her status and rights under the Constitution of the United States and seeks a declaration of the legal and constitutional rights of

the parties with respect to the subject matter of this action.

18. Plaintiff will continue to suffer immediate and irreparable injury, loss or damage unless this Court grants the injunctive relief sought. There is no plain, adequate or speedy remedy at law to redress these deprivations.

V.

CLAIMS FOR RELIEF

19. There exists between the parties an actual controversy as heretofore set out. The Plaintiff is suffering and is threatened with immediate and irreparable injury as a result of the actions of FLORIDA INTERNATIONAL UNIVERSITY as stated above. The Plaintiff has no plain nor adequate remedy at law to redress the wrongs and unlawful conduct complained of herein. FLORIDA INTERNATIONAL UNIVERSITY has severely damaged Plaintiff by

its discriminatory practices and has painfully stigmatized Plaintiff, and continues to do so. By the actions of FLORIDA INTERNATIONAL UNIVERSITY, Plaintiff has been discriminated against and denied due process of law in violation of her rights under the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. FLORIDA INTERNATIONAL UNIVERSITY has acted in violation of Title 42, U.S.C. §1983, to inflict said deprivations on the Plaintiff.

WHEREFORE, Plaintiff prays this Honorable Court to enter the following relief:

A. Assume jurisdiction of this cause;

B. Enter a final judgment pursuant to 28 U.S.C., §2201 and Rule 57, of the Florida Rules of Civil Procedure declaring that the Plaintiff has suffered from acts of discrimination at the hands of

the Defendants or its agents, contrary to the Due Process Clause of the Fourteenth Amendment;

C. Require Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of $500,000 as actual and exemplary damages;

D. Assess all costs against the Defendant and award the same to the Plaintiff;

E. Award attorney's fees to the Plaintiff;

F. That the Court order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination

complained of herein.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorney for Plaintiff
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

BY: /s/
DENIS DEAN, SR.

BY: /s/
EUGENE P. SPELLMAN

00044

October 30, 1972

Mr. D. Burke Kibler, III
Post Office Box 1772
Lakeland, Florida 33802

Dear Burke:

Thank you for your recent letter concerning the employment status of Mrs. John Patsy at Florida International. Our Personnel Department has advised me that Mrs. Patsy is being considered for the position of Secretary III in the Division of Health and Physical Education, Recreation and Athletics in the School of Education.

In the past she has been interviewed by the Dean of the Division of Special Programs and the Director of Financial Aid. Unfortunately, there are just not any counselor positions available. We realize Mrs. Patsy's background qualifies her for a higher position than the clerk typist position she now holds. However, as the situation stands the Secretary III position is the highest one we have to offer.

Thank you for your interest—and best wishes.

Sincerely,

Charles E. Perry
President

CP/jm
bcc: Personnel Department with file

EXHIBIT A

FLORIDA INTERNATIONAL UNIVERSITY

*MEMORANDUM*

*TO:* Mrs. Georgia Patsy *DATE:* June 21, 1977

*FROM:* Dr. Ronald S. Tikofsky

*SUBJECT:* CONTRIBUTIONS TO THE DEPARTMENT OF PSYCHOLOGY

---

It goes without saying, from my point of view, that your presence in the Department as my Secretary and Office Manager have created what I believe to be an outstanding professional attitude within the office staff. I have worked with many secretaries over the years but never have I been so pleased and proud to be able to recognize formally the contribution of someone like yourself. You have really taken charge and set a tone and atmosphere that is absolutely outstanding. Your professional competence, personal skills, and management abilities have impressed me greatly. More work is being done in the Department than has ever been done before, it is being done better, and with more professionalism than before. You have created an esprit de corps among the other members of the secretarial staff that is going a long ways to keeping our Department highly efficient in the face of all sorts of pressures and demands.

Your ability to handle pressure situations, keeping me and other members of the faculty in tow when necessary, and dealing with administrative matters within the University that relate to the Department, in a cool and proficient way with a sense of humor, has made a significant contribution to the well being of the Department. It gives me great pleasure to be able to take this opportunity to recognize in a formal way your outstanding contributions to the Department and in particular for your work directly related to my activities. I wish there were some way that I could more properly recognize the contributions you and other members of the secretarial staff have made to all of us in the Department.

cc: Dean Arthur Herriott, College of Arts & Sciences
Mrs. Patricia Caruso, Director of Personnel

*( Inter–office Communication )*

EXHIBIT B

FLORIDA INTERNATIONAL UNIVERSITY
PERFORMANCE APPRAISAL

00046

Name Patsy, Georgia D. Social Security No. 232-64-1699

Department Psychology Classification Title Secretary OPS

Type of Appraisal: ☐ Probationary ☐ Anniversary ☑ Special

Period of Evaluation: From: 8-1-77 To: 8-1-78

NOTE: This form is to be completed by the rating supervisor and reviewed with the employee for overall appraisal of performance and mutual agreement (including in the spaces provided). The original must be returned to Personnel Services, the second copy retained in the department and the third copy given to the employee. (See reverse side for more detailed instructions.)

1. JOB KNOWLEDGE (Understanding of all phases of job, including use of methods, techniques, tools and materials, for safe and satisfactory performance)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Has full command of job requirements for her own position as well as other Career Service staff. Thoroughly understands the University System and uses this knowledge to maximize her understanding of her position.

2. QUALITY (Accuracy, completeness) -

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Work is always done with exceptional accuracy. Catches and corrects syntactic and spelling errors in rough drafts without having to be told to do so.

3. QUANTITY (Productivity, volume)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Mrs. Patsy always hears deadlines in spite of a very heavy and diverse workload. She produces a high volume of work with a very short turn-around time.

4. DEPENDABILITY (Reliable, trustworthy, regular in attendance)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Completely reliable, requires no supervision.

5. ORGANIZATION (Consider delegation of assignments, directing work flow and following up on results.)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Exceptionally systematic organizer. Makes maximum use of time with high levels of effectiveness.

6. INITIATIVE (Desire to work, attain, and achieve goals; seeks additional responsibility)

☑ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Complete self-starter, dedicated to her job, always trying to come up with new ways to improve office routines and increase efficiency and productivity. Accepts responsibility voluntarily.

WHITE-Personnel Services - CANARY-Evaluator's Copy - PINK-Employee Copy

EXHIBIT C

00047

7. SUPERVISORY ABILITY (Effectiveness in directing activities of others, including verbal and written communication, results, relations and complaints, and commitment to take action) Use only when rating a supervisor.

- ☐ Outstanding
- ☐ Above Satisfactory
- ☐ Satisfactory
- ☐ Conditional
- ☐ Unsatisfactory
- ☐ Not Applicable

Justification: _____

OVERALL EVALUATION (Considering total performance, how well employee performed)

- ☑ Outstanding
- ☐ Above Satisfactory
- ☐ Satisfactory
- ☐ Conditional
- ☐ Unsatisfactory

Justification: Mrs. Patsy is by far and away the most professional and best secretary I have had working with me since coming to FIU in 1971. She is truly a professional. In fact, she functions more as my staff assistant than as a secretary. She exceeds the performance standards for the position she holds in the department.

Employee's comments and views on the preceding statements:

Use attachments, if necessary.

Signature of Employee: _____ Date: _____
(Does not imply concurrence with supervisor's evaluation, only that evaluation was made and reviewed by employee.)

Signature of Immediate Supervisor: _____ Date: _____

Signature of Second-Level Supervisor or Dept. Head _____ Date: _____

The employee was informed of his/her progress on the following dates:

_____ _____ _____ _____

Supervisor and employee should indicate agreement of dates by initialing.

00048

FLO[illegible]DA INTERNATIONAL UNIVERSI[illegible]
PERFORMANCE APPRAISAL

Name [illegible] Social Security No. [illegible]

Department: Psychology Dept. Classification Title: [illegible]

Type of Appraisal: ☐ Probationary ☐ Anniversary ☐ Special

Period of Evaluation: From: 7/1/77 To: 3/1/77

NOTE: This form is to be completed by the immediate supervisor and reviewed with the employee by checking appropriate level of performance and making appropriate comments in the space provided. The original must be returned to Personnel Services, one copied copy retained in the department, and the third copy given to the employee. (See reverse side for more detailed instructions.)

1. JOB KNOWLEDGE (Understanding of all phases of job, including use of methods, techniques, tools and materials, for safe and satisfactory performance)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: [illegible]

2. QUALITY (Accuracy, completeness)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: The typing is frequently error free. Occasionally some copy such as dashes and ellipses [illegible] All of Mrs. Patsy's work meets acceptable standards of quality.

3. QUANTITY (Productivity, volume)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: The amount of work Patsy is [illegible] normally expected of a person in this position. All dictation unless other time is given is done the same day. Mrs. Patsy is always ahead of me in getting work done.

4. DEPENDABILITY (Reliable, trustworthy, regular in attendance)

☐ Outstanding
☐ Above Satisfactory
☒ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: [illegible]

5. ORGANIZATION (Considers delegation of assignments, directing work flow and following up on results)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: In the short time she has been with the dept. Mrs. [illegible] done a tremendous job on [illegible] coordination, and [illegible] efficiency and morale of office staff and faculty.

6. INITIATIVE (Desire to work, attain, and achieve goals; seeks additional responsibility)

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: Mrs. Patsy doesn't wait to be told what to do. She recognizes what has to be done and proceeds to see [illegible] She has had a high [illegible] of [illegible] and varied routines. She offers [illegible] library and maintains [illegible] personality.

WHITE-Personnel Services - CANARY-Evaluator's Copy - PINK-Employee Copy

00049

7. SUPERVISORY ABILITY (Ability in directing activities of others, including verbal and written communication, resolving grievances and complaints, and commitment to affirmative action. Use only when rating a supervisor.

☐ Outstanding
☐ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory
☐ Not Applicable

Justification: _____

OVERALL EVALUATION (Considering total performance, how well employee performed)

☐ Outstanding
☒ Above Satisfactory
☐ Satisfactory
☐ Conditional
☐ Unsatisfactory

Justification: Mrs. Patay's performance has exceeded my expectations of her capabilities. She is a hard worker who manages high standards of performance on her work and demands excellence of herself. I am certain that as she becomes more familiar with the processes & procedures, will show further development.

Employee's comments and views on the preceding assessment

Use attachments, if necessary.

Signature of Employee _____ Date: 5-1-77

(Does not imply concurrence with supervisor's evaluation, only that evaluation was made and reviewed by employee.)

Signature of Immediate Supervisor _____ Date: 5-1-77

Signature of Second-Level Supervisor or Dept. Head _____ Date: 5-1-77

00050

## PERFORMANCE APPRAISAL SYSTEM

## CAREER SERVICE EMPLOYEES

I POLICY — "A philosophy and appraisal system that recognizes and encourages performance not only provides the stimulus to improve and develop but also results in superior performance in the long run."[1] It is important, therefore, that our University envision and understand sound principles of performance appraisal administration which can be applied effectively on a department basis to facilitate: (A) Building of better understanding between the employee and the administration. (B) Classification of actual goals of the employee, the employee's supervisor, and the University. (C) Information the employee of current and past reports in the performance of work assignments as well as evaluation of goals and objectives. (D) Determining the employee's potential for promotion. (E) Determining the employee's eligibility for merit salary advancements. (F) Instituting disciplinary actions when required.

II AUTHORITY — In accordance with Chapter 22-6.0 of the Personnel Rules and Regulations of the Career Service System, State of Florida, each employee shall receive a performance appraisal by his immediate supervisor and all ratings shall be reviewed and approved by the next higher level administrator. In all cases, the supervisor doing the rating must be familiar with the performance of the employee during the rated portion of the rating period.

III PROCEDURE FOR INITIATING AND COMPLETING PERFORMANCE APPRAISALS — (A) The Personnel Officer will notify the administrative head of required employee appraisals approximately thirty (30) days before they are due by forwarding copies of the appraisal form indicating the name of the employee, his assignment, and anniversary or promotion date. (B) Receipt of the form should be considered notice to the administrative head that the employee is to have an appraisal and should be assigned to the appropriate supervisor in charge. (C) The immediate supervisor will evaluate the performance of the employee by completing the performance appraisal form considering the criteria for the position to which the incumbent of the class is assigned. (D) After evaluating the employee's performance, the supervisor shall submit the appraisal form to his own administrative for approval. In no case shall both actions be performed by the same person. (E) After the completed appraisal form has been approved by the next level of supervision, the immediate supervisor shall discuss the review with the employee. At this point, the primary objective should be: 1. Communicating the appraisal in order to justify decisions. 2. Attempting to reinforce improved performance, and. 3. Informing the employee exactly where he/she stands in the eye of supervision. (F) Any performance rating of either than "Satisfactory" must be explained in detail on the rating form or in an attached statement. (G) The employee should sign each appraisal form which is prepared and discussed with him/her, however, this is not mandatory. In the event the employee does not wish to sign the appraisal form, it shall be placed in the employee's personnel file with a notation that the employee refused to sign the evaluation. (H) A copy of the completed appraisal form will be provided to the employee upon request. (I) The completed appraisal form should be returned to the Personnel Office as soon as the appraisal has been discussed. The appraisal form will then be placed in the employee's permanent record file and will be available to the employee's supervisor for future reference at his discretion.

IV THE APPRAISAL FORM — (A) THE RATING SCALE consists of five numbers and terms to be applied to each factor rated and to the overall evaluation. The terms which make up the scale are: 1. Unsatisfactory - the employee's performance is not acceptable. Serious failed consistently to meet the minimum requirements for the position. 2. Conditional - the employee's performance is marginal. The employee has failed seriously to maintain the minimum performance requirements, but shows a potential for improvement. 3. Satisfactory - the employee's performance is completely acceptable in all job requirements. 4. Above Satisfactory - the employee's performance has far exceeded the minimum requirements for the position. 5. Outstanding - the employee's performance appears to approach by any significant extent. The employee is considered totally competent in all respects.

(B) THE RATINGS - The shall be entered on the appraisal - to and shall be determined on the basis of total rating factors. (C) RATING FACTORS - The Performance Appraisal Form includes an assessment - being factors: 1. Under - Level of Job - is the overall evaluation of this factor, based the employee's knowledge, attitude and conduct when in an official manner compared to a standard which meets the approval of the immediate supervisor, division director or administrative head. 2. and 3. Quality and Quantity of Work - mandatory evaluation. Satisfactory, Outstanding and effectiveness of the volume of work performed that is required by the employee's control. For example, a typist may be said to type twenty letters a day, but if the employee's supervisor only types two that letters, the volume is beyond the employee's control. 4. Responsibility - considered procedure and job knowledge required and/or performance in carrying assignments. The employee's attention to blunders in the accuracy of direct and indirect communication to consider importance of this factor. 5. Personal Relations - consistent collection of satisfactory, situation work flow and follow-ing up on records. 6. Dependability - considered responsibilities, call-in-sick, willingness to correct and to carry out responsibility, and the responsibility of the employee to work assignments. 7. Supervisory Ability[2] - to the employee when rating supervisory duty. In the overall evaluation of this factor, consider the employee's ability to organize, plan, train, discipline, delegate and control the work of his subordinates in an orderly and efficient manner. In addition, need to set an example for his employees by supporting and requiring high standards of performance, safety, sound decisions and leadership. Provides guidance and coordination in disciplinary control and in evaluating and improving performance levels of his employee.

V PERIOD OF APPRAISAL — (A) Probationary Appraisal - each Career Service employee should be appraised by his/her immediate supervisor at least two to four weeks prior to the date ending the probationary period (six months continuous and creditable service from the date of initial employment or promotion). (B) Anniversary Appraisal - each employee's performance will be appraised by his/her immediate supervisor at least thirty (30) days prior to the employee's anniversary date. An employee's anniversary date shall be established twelve (12) calendar months to the date following initial employment or promotion, except that: 1. An employee who is granted leave of absence without pay in excess of five work days during any pay period, or educational leave with pay, will have the anniversary date advanced one calendar day for each day or work leave. 2. An employee who has received a "Conditional" or "Unsatisfactory" performance appraisal, as discussed in Section IV (A), shall have the anniversary date advanced one calendar day for each calendar day such rating is in effect. 3. An employee who is demoted prior to receiving permanent status, in any class, shall have the anniversary date re-established twelve (12) calendar months to the date from the date of demotion. (C) Special Appraisal - reviews for the purpose of reconsidering performance other than "Satisfactory" may be made at any time and shall not change the anniversary date. (D) Satisfactory Appraisal - ratings of "Conditional" and "Unsatisfactory" require subsequent review every sixty (60) days until: 1. The employee's performance has improved and is evaluated at least "Satisfactory"; or 2. His service have elapsed without the employee receiving a rating of at least "Satisfactory". In both cases, the employee should be removed from the classification.

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"Supervisory is defined as any employee, who on a day-to-day basis, directs the work of one or more employees/employees, and has authority to employ or discharge employees, or has recommendations are given particular weight.

[1] Edwin B. Flippo, Principles of Personnel Management, McGraw-Hill Publishing Company, New York, New York, 1966, p. 367.

00051

FLORIDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL (CAREER SERVICE EMPLOYEES)

NAME: Patsy Georgia SOCIAL SECURITY NO. 232-54-1695 EMPLOYMENT DATE: 6-1-73

COLLEGE/DIVISION: Physical Education CLASSIFICATION: Secretary III

☐ 6-MONTH EVALUATION ☐ ANNIVERSARY DATE EVALUATION PERIOD COVERED BY THIS REVIEW---From 1-10-76 To

RATING INSTRUCTIONS: 1. Non-supervisory employee - rate only factors 1-4. 2. Supervisory employee - rate all factors 1-5.

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System for Career Service employees as reproduced on the reverse side of this form.

| FACTOR | UNSATISFACTORY | CONDITIONAL | SATISFACTORY | ABOVE SATISFACTORY | OUTSTANDING |
|---|---|---|---|---|---|
| | 1 | 2 3 | 4 5 6 7 | 8 9 | 10 |
| (1) Knowledge of Job | Has not gained adequate comprehension of job. | Insufficient knowledge of some phase of job. | Adequate knowledge of all phases of job. | Thorough knowledge of all phases of job. Organizes and arranges work efficiently. | Has complete comprehension of job and often makes suggestions to improve efficiencies. |
| | 1 | 2 3 | 4 5 6 7 | 8 9 | 10 |
| (2) Quality & Quantity of Work | Does not meet acceptable minimum requirements. | Works slowly. Accurately produces only enough to get by. | Regularly accomplishes accurate, complete work in allotted time. | Works rapidly producing consistently error free work in excess of regular requirements. | Has exceptionally accurate and complete expertise of job. |
| | 1 | 2 3 | 4 5 6 7 | 8 9 | 10 |
| (3) Dependability | Regularly late and often absent. With constant supervision seldom finishes assigned tasks. | Frequently late and absent. Must be regularly prodded to accomplish assigned tasks. | Usually reports at scheduled times. Completes duly performance standards. | Seldom late or absent. Works well in the absence of direct supervision | Extremely good attendance record. Works uncommonly often outside of normal hours. |
| | 1 | 2 3 | 4 5 6 7 | 8 9 | 10 |
| (4) Initiative | Shows no interest in job. | Frequently appears indifferent and unwilling to accept responsibility. | Shows interest in job and willing to accept responsibility. | Gets interested in job and from time to time responsibilities. | Extremely self-motivating and resourceful. Consistently searches for ways to improve efficiencies of self and job. |
| | 1 | 2 3 | 4 5 6 7 | 8 9 | 10 |
| (5) Supervisory Ability (Use only when rating a supervisor) | Regularly demonstrates deficient organization, planning, and leadership abilities. Work results of subordinates frequently unsuccessful. | Frequently demonstrates inadequate organization, planning and leadership abilities. Work results of subordinates below par at times. | Consistently demonstrates standard organization, planning and leadership skills. Obtains acceptable results from subordinates. | Demonstrates exceptional abilities in organization, planning and leadership ability. Frequently obtains high standards of performance from his subordinates. | Has a high qualities in organization, planning, and leadership ability. Consistently obtains maximum performance from his subordinates. |

| | Non-Supervisory | Supervisory |
|---|---|---|
| Unsatisfactory | 4 - 7 | 5 - 8 |
| Conditional | 8 - 15 | 9 - 18 |
| Satisfactory | 16 - 31 | 19 - 38 |
| Above Satisfactory | 32 - 36 | 39 - 45 |
| Outstanding | 37 - 40 | 46 - 50 |

Total Appraisal: 40

Rated by: [signature] Date: 6-24-76

Approved by: [signature] Date: 6-25-76

Employee's Signature: (Indicate reason for not signing) Date: 6-24-76

RATER'S JUSTIFICATION: (Required for any non-supervisory total less than 16 or more than 37 and supervisory total less than 19 or more than 38 with examples as to why and how this employee is performing either above or below the satisfactory norm.)

(See ATTACHED)

EMPLOYEE'S COMMENTS:

(Add additional sheets if necessary)

CONFIDENTIAL - ONCE COMPLETED, ASSIGNED COPY TO EMPLOYEE, OTHER COPY

Best Copy Available

00052

FLORIDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL (CAREER SERVICE EMPLOYEES)

NAME: Patsy, Georgia SOCIAL SECURITY NO. 232-54-1695 EMPLOYMENT DATE: 6-1-72

COLLEGE/DIVISION: Physical Education CLASSIFICATION: Secretary III

☐ 6-MONTH EVALUATION ☒ ANNIVERSARY DATE EVALUATION PERIOD COVERED BY THIS REVIEW---From 11-10-74 To 11-10-75

RATING INSTRUCTIONS: 1. Non-supervisory employee - rate only Factors 1-4. 2. Supervisory employee - rate all Factors 1-5.

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System for Career Service employees as reproduced on the reverse side of this form.

| FACTOR | UNSATISFACTORY | CONDITIONAL | SATISFACTORY | ABOVE SATISFACTORY | OUTSTANDING |
|---|---|---|---|---|---|
| (1) Knowledge of Job | 1 Has not gained adequate comprehension of job. | 2 3 Insufficient knowledge of some phase of job. | 4 5 6 7 Adequate knowledge of all phases of job. | 8 9 Thorough knowledge of all phases of job. Organizes and arranges work efficiently. | (10) Has complete comprehension of job and often makes suggestions to improve efficiencies. |
| (2) Quality & Quantity of Work | 1 Does not meet acceptable minimum requirements. | 2 3 Works slowly. Accurately produces only enough to get by. | 4 5 6 7 Regularly accomplishes accurate, complete work in allotted time. | 8 9 Works rapidly producing consistently error free work in excess of regular assignments. | (10) Has exceptionally accurate and complete knowledge of job. |
| (3) Dependability | 1 Regularly late and often absent. With constant supervision seldom finishes assigned tasks. | 2 3 Frequently late and absent. Must be regularly prodded to accomplish assigned tasks. | 4 5 6 7 Usually present at scheduled times. Requires only periodic checking. Meets deadlines. | 8 9 Seldom late or absent. Works well in the absence of direct supervision. | (10) Extremely good attendance record. Works independently often exhibits effort beyond what is expected. |
| (4) Initiative | 1 Shows no interest in job. | 2 3 Frequently appears indifferent and unwilling to accept responsibility. | 4 5 6 7 Shows interest in job and willing to accept responsibility. | 8 9 Very interested in job and often seeks new responsibilities. | 10 Extremely self-motivating and resourceful. Consistently searches for ways to improve efficiencies of self and job. |
| (5) Supervisory Ability (Use only when rating a supervisor) | 1 Regularly demonstrates deficient organization, planning, and leadership abilities. Work results of subordinates frequently unsuccessful. | 2 3 Frequently demonstrates inadequate organization, planning and leadership abilities. Work results of subordinates below par at times. | 4 5 6 7 Consistently demonstrates standard organization, planning and leadership skills. Obtains acceptable results from subordinates. | 8 9 Demonstrates excellent qualities in organization, planning and leadership ability. Frequently exceeds high standards of performance from his subordinates. | 10 Has superior qualities in organization, planning, and leadership ability. Consistently obtains maximum performance from his subordinates. |

| | Non-Supervisory | Supervisory |
|---|---|---|
| Unsatisfactory | 4 - 7 | 5 - 8 |
| Conditional | 8 - 11 | 9 - 12 |
| Satisfactory | 12 - 33 | 13 - 38 |
| Above Satisfactory | 34 - 36 | 39 - 45 |
| Outstanding | 37 - 40 | 46 - 50 |

Total Appraisal: 40

Date: 10/27/75

Date: 10/27/75

RATER'S JUSTIFICATION: (Required for any non-supervisory score less than 34 or more than 36 and supervisory score less than 39 or more than 45 with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Georgia Patsy has been superior in all aspects of her position responsibilities during this past year. She is an extremely knowledgeable person with the capability of handling many tasks over and above what might traditionally be considered clerical. She is punctual, hard working, and

EMPLOYEE'S COMMENTS: professional in every respect. Her opinion is highly valued and those who work with her constantly seek advice. She has always placed the business and image of the division above all other considerations.

(add additional sheets if necessary)

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING NEED CAUSE

00053

FIU - DA INTERNATIONAL UNIVERSITY --

PERFORMANCE APPRAISAL

Career Service Employee

Name: Patsy, Georgia P. Classification: Clerk Typist III

College/Division: Physical Education Social Security Number: [redacted]

Employment Date: 6-1-72 Purpose: Annual/Anniversary Date Evaluation

Period Covered by this Review: From 11-10-73 To 11-10-74

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

| Rate each factor by circling the numerical value | Outstanding | Above Satisfactory | Satisfactory | Conditional | Unsatisfactory |
|---|---|---|---|---|---|
| Appearance | XXXXX | (3) | 2 | 1 | 0 |
| Attendance | XXXXX | (3) | 2 | 1 | 0 |
| Knowledge of Job | (4) | 3 | 2 | 1 | 0 |
| Quality of Work | (4) | 3 | 2 | 1 | 0 |
| Quantity of Work | (4) | 3 | 2 | 1 | 0 |
| Initiative | (4) | 3 | 2 | 1 | 0 |
| Dependability | (4) | 3 | 2 | 1 | 0 |
| Attitude | (4) | 3 | 2 | 1 | 0 |
| Relationship with Others | (4) | 3 | 2 | 1 | 0 |

| | |
|---|---|
| Outstanding | 32 and above |
| Above Satisfactory | 24 thru 31 |
| Satisfactory | 16 thru 23 |
| Conditional | 9 thru 15 |
| Below Satisfactory | 0 thru 8 |

Total Score 34

Rated By: [signature] Date 9/26/74

Approved by Administrative Head/Dean/Director: [signature] Date Oct. 2 '74

Employee's Signature: _____ Date _____

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 23, with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Patsy has again proven to be an outstanding secretary during this past year. She does not need to be told what to do, she is organized, her work is very good, and she puts a great deal of extra time into her job. She has handled her Division responsibilities well and she gets along with everyone. She is always able to do the little extra things that make life around the office a little easier on everyone.

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

00054

FT IDA INTERNATIONAL UNIVERSITY

PERFORMANCE APPRAISAL

Career Service Employees

Name Patsy Vicroy Classification Sec. III

College/Division Phys. Ed. Social Security Number ___-___-____

Employment Date: 11.10.72 Purpose: 6 Mo. Evaluation/Anniversary Date Evaluation

Period Covered by this Review: From 5.10.73 To 11.10.73

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

Rate each factor by circling the numerical value

| | Outstanding | Above Satisfactory | Satisfactory | Conditional | Unsatisfactory |
|---|---|---|---|---|---|
| Appearance | XXXXX | (3) | 2 | 1 | 0 |
| Attendance | XXXXX | (3) | 2 | 1 | 0 |
| Knowledge of Job | (4) | 3 | 2 | 1 | 0 |
| Quality of Work | (4) | 3 | 2 | 1 | 0 |
| Quantity of Work | (4) | 3 | 2 | 1 | 0 |
| Initiative | (4) | 3 | 2 | 1 | 0 |
| Dependability | (4) | 3 | 2 | 1 | 0 |
| Attitude | (4) | 3 | 2 | 1 | 0 |
| Relationship with Others | 4 | (3) | 2 | 1 | 0 |

| | |
|---|---|
| Outstanding | 32 and above |
| Above Satisfactory | 24 thru 31 |
| Satisfactory | 16 thru 23 |
| Conditional | 9 thru 15 |
| Below Satisfactory | 0 thru 8 |

Total Score 33

Rated By: [signature illegible] Date 11/6/73

Approved by Administrative Head/Dean/Director: [signature illegible] Date 11/6/73

Employee's Signature: [signature illegible] Date 11.6.73

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 33, with examples as to why and how this employee is performing either above or below the satisfactory norm.)

Mrs. Vicroy is an extremely reliable employee. She works well with others, excellent quality & best of all she is always very cheerful. She is a good hostess & she will work at other functions.

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

TO: Dean Sowards

00055

PERFORMANCE APPRAISAL

Career Service Employees

Name Patsy, Georgia D. Classification Secretary III

College/Division Physical Education Social Security Number 232-54-1695

Employment Date: 11/10/72 Purpose: 6 Mo. Evaluation

Period Covered by this Review: From 11/10/72 To 5/10/73

Do not complete this review until you read and understand FIU policies on the Performance Appraisal System and Uniform Pay Plan for Career Service Employees.

| Rate each factor by circling the numerical value | Outstanding | Above Satisfactory | Satisfactory | Conditional | Unsatisfactory |
|---|---|---|---|---|---|
| Appearance | XXXXX | (3) | 2 | 1 | 0 |
| Attendance | XXXXX | (3) | 2 | 1 | 0 |
| Knowledge of Job | (4) | 3 | 2 | 1 | 0 |
| Quality of Work | (4) | 3 | 2 | 1 | 0 |
| Quantity of Work | (4) | 3 | 2 | 1 | 0 |
| Initiative | (4) | 3 | 2 | 1 | 0 |
| Dependability | (4) | 3 | 2 | 1 | 0 |
| Attitude | (4) | 3 | 2 | 1 | 0 |
| Relationship with Others | (4) | 3 | 2 | 1 | 0 |

| | |
|---|---|
| Outstanding | 32 and above |
| Above Satisfactory | 24 thru 31 |
| Satisfactory | 16 thru 23 |
| Conditional | 9 thru 15 |
| Below Satisfactory | 0 thru 8 |

Total Score 34

Rated By: [signature] Date 4/16/73

Approved by Administrative Head/Dean/Director: [signature] Date 4/17/73

Employee's Signature: [signature] Date 4-18-73

RATER'S JUSTIFICATION: (Required for any score less than 16 or more than 23, with examples as to why and how this employee is performing either above or below the Satisfactory norm.)

CONFIDENTIAL - ONCE COMPLETED, AVAILABLE ONLY TO PERSONS SHOWING GOOD CAUSE

00056

INDIANA UNIVERSITY
School of Health, Physical Education, and Recreation
HPER BUILDING
BLOOMINGTON, INDIANA 47401

PHYSICAL EDUCATION FOR MEN

AREA CODE 812 337-1844
TEL. NO.

April 17, 1973

Black

Dr. Paul E. Hartman
Chairman
Division of Health, Physical
Education and Recreation
Florida International University
Tamiami Trail
Miami, Florida 33144

Dear Dr. Hartman:

In reply to your letter in which you are seeking individuals in the area of Health Education, I wish to suggest the name of Miss Vesta Massey, who is beyond her Master's degree in Health Education. Vesta is a young Black lady who is also very knowledgeable in the area of Movement Education and Modern Dance.

Since you have indicated Blacks and Latins, I have no other people to suggest at the present time, but will present their names for consideration if I find them in my travels around the country.

I hope that we can be of service to you.

Very truly yours,

John Bronsecum
Coordinator of Placement

JB:jes

Called 4-23-73 4:00 p.m.
Credentials to be sent
Mrs. May to call 4-24-73
Called Hartman 4-25-73 4:15
Mr. May to call back

EXHIBIT D

8 8 61

00057

FLORIDA INTERNATIONAL UNIVERSITY

MEMORANDUM

TO: Dr. Glenn A. Goerke DATE: July 9, 1973

FROM: Charles E. Perry

SUBJECT: Wrestling Coach

---

Just a reminder to you and to Dr. Hartman that none of the head coaches are to be appointed without being interviewed and approved by me. I assume that this will be done in regard to the wrestling coach.

It is my understanding that there is an outstanding Black wrestling coach at Miami-Dade South who is a graduate of Florida A&M and has a Masters degree from someplace. I further understand that he has had a great interest in the wrestling job here at Florida International. It would seem to me that we should look very carefully at this young man, because having a head coach who knows the local wrestling situation (and who is Black) would be a great advantage to the University.

Thank you.

cc: Dr. Paul Hartman
CEP/mam

EXHIBIT E

4 1 62

00058

FLORIDA INTERNATIONAL UNIVERSITY

MEMORANDUM

TO: Dr. Judy Blucher, Associate Professor, Division of HPER
DATE: October 22, 1976
FROM: Mrs. Georgia Petsy
SUBJECT: INTERIM COUNSELOR POSITION IN THE SCHOOL OF EDUCATION

On October 6, 1976, a resume for the position interim counselor in the School of Education was submitted for your review by Mrs. Georgia Petsy through the office of Dr. Paul Gallagher, Associate Dean, School of Education. Information is being solicited as to the date the resume was reviewed by you and your reactions to the qualifications of the applicant and also to the letters of recommendation which accompanied the resume. It should be noted that Mrs. Petsy has been an employee of FIU since June, 1972, and has been the Division Secretary in the Division of HPER since November 13, 1972. As a courtesy to a School of Education employee, it is requested that you respond to this request for information on the bottom section of this memorandum. Your cooperation will be appreciated.

Georgia -
My reactions were to list you among the top three candidates based upon written resumes that I reviewed for all candidates. I have heard nothing else about the position.

Sincerely,
Judy Blucher

(INTER-OFFICE COMMUNICATION)

(11-25-76)

EXHIBIT F

8 63

00059

Paul Gallagher Oct. 5, 1976

Judy Blucker

Candidates for Counseling Position

My ranking of the candidates after review of their resumes are as follows:

| | | Comments |
|---|---|---|
| 1. | John E. Taylor | Experienced in counseling and other self-initiated administrative responsibilities |
| Tie 2. | Margaret Culley | Same as above plus teaching experience |
| Tie 2. | Carol Cooper | Same as above plus social work experience |
| 4. | Joanna Albert | Training in Counseling; some experience |
| 5. | Barbara Bader | Experience in working with teacher education students |
| 6. | Joseph W. Wesley | Education training in Counseling; little or no experience (actual experience) |
| 7. | James McKinney | Educational background; little experience |

00060

FLORIDA INTERNATIONAL UNIVERSITY
TAMIAMI TRAIL • MIAMI, FLORIDA 33199 • (305) 552-2181

ADMINISTRATIVE AFFAIRS
OFFICE OF PERSONNEL SERVICES

August 11, 1978

Ms. Georgia Patsy
8325 S. W. 151 Street
Miami, Florida 33158

Dear Ms. Patsy:

I would like to express our appreciation for your interest in the Admissions Counselor position that was recently available in the Registrar's Office. The selection process was difficult and competitive. This is to notify you that the position was filled by another applicant. Since you are a qualified applicant, we would like to keep your application active for consideration in future openings.

As you know, all staff and administrative/professional position vacancies at the University are posted in our Personnel Office on both campuses as well as being listed in the weekly editions of the Blue Bulletin. An additional source of information on employment opportunities is the State of Florida Department of Education's Position Vacancy Listing, which is also posted in Personnel. This listing is published on a weekly basis and includes details on all faculty, administrative/professional and Career Service time card-exempt position vacancies that are available within the State University System and the Community College System. You may now call JIL ... (Our Job Information Line) to inquire about current vacancies at the University. By calling 552-2500, you will receive recorded information regarding current vacancies and their respective salaries, minimum requirements and application deadline dates.

It has always been a policy at Florida International University to encourage employees to seek opportunities within the University. Please be assured that we will be glad to assist you in any way possible should you have any further inquiries.

Sincerely,

Susan Pyle

Susan Pyle,
Personnel Services

SP:fc

THE STATE UNIVERSITY SYSTEM OF FLORIDA
EQUAL OPPORTUNITY EMPLOYER

EXHIBIT G

[CAPTION]

DEFENDANT'S MOTIONS TO
DISMISS THE AMENDED COMPLAINT

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, the defendant, Florida Board of Regents ("BOR"), respectfully moves this Honorable Court to dismiss the amended complaint against it for the following reasons:

1. The Court lacks subject matter jurisdiction because the defendant is not a "person" under 42 U.S.C. § 1983 and because the plaintiff has failed to exhaust her administrative remedies.

2. The amended complaint fails to state a claim upon which relief can be granted.

DEFENDANT'S ALTERNATIVE MOTION
FOR A MORE DEFINITE STATEMENT

Should this Court deny the BOR's dismissal motions, then pursuant to Rule 12(e), F.R.Civ.P., the BOR respectfully

moves this Court to order Plaintiff to render a more definite statement of her claim.

WHEREFORE, the BOR respectfully requests this Court to dismiss the amended complaint with prejudice and award the BOR a reasonable attorneys' fee. Alternatively, the BOR respectfully requests a more definite statement of plaintiff's claims.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney, Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney, Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

INTRODUCTION

Plaintiff, a white female clerical employee at Florida International University ("FIU"), has now refiled her complaint against the Florida Board of Regents ("BOR"). Plaintiff contends that she has suffered "reverse (racial) discrimination" in violation of 42 U.S.C. § 1983 ("§ 1983") apparently because she has unsuccessfully applied for positions for which FIU has engaged in "an intentional and concerted effort" to fill with minority applicants (Latins and non-whites). (Complaint ¶¶ 2, 7, 8, 11(a), 12, 16(a)) Plaintiff also generally contends that she has suffered sex discrimination. (Complaint ¶¶ 11(a), 16(a)) The balance of plaintiff's "Statement of Claim" con-

cerns evidentiary matters dealing with her alleged qualifications and FIU's alleged record-keeping policies (Complaint ¶¶ 5, 6, 9, 10, 11, 16), FIU's efforts to fill vacancies which were apparently not sought by plaintiff (Complaint ¶¶ 13, 15), FIU's alleged "deceit" in failing to advise plaintiff correctly as to her status as a "finalist" in contention for a particular position. (Complaint ¶ 14). Based on these allegations, plaintiff makes several relief oriented statements and requests. (Complaint ¶ 17, 18, and 19).

For all the following reasons, this Court should dismiss the Amended Complaint because plaintiff's allegations fail to state a claim upon which relief can be granted and reveal the absence of subject matter jurisdiction.

## ARGUMENT

I. THIS COURT SHOULD DISMISS THE AMENDED COMPLAINT FOR LACK OF JURISDICTION BECAUSE:

A. The Board of Regents Is Not A "Person" Within The Meaning of 42 U.S.C. § 1983.

The courts have consistently held that states and their agencies are not "persons" within the meaning of § 1983. Vick v. Texas Employment Commission, 514 F.2d 734 (5th Cir. 1975); Cheramie v. Tucker, 493 F.2d 586 (5th Cir. 1974). This exclusion also encompasses state universities and their governing boards. Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976), cert. denied, 421 U.S. 952, aff'd on other grounds, 430 U.S. 651 (1977); Blanton v. State University of New York, 489 F.2d 377, 382 (2nd Cir. 1973). Finally, the Fifth Circuit has made it quite clear that a defendant's status as a "person" under § 1983 does not vary

depending upon the relief sought. Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976)(en banc), vacated and rem. on other grounds, 57 L.Ed. 2d 1144 (1978). The recent U.S. Supreme Court decision of Monell v. Dept. of Social Services, 436 U.S. _____, 56 L.Ed. 2d 611 (1978) has not overruled these decisions with respect to the status of state agencies as "persons" under § 1983.

In Monell, the Supreme Court held that local governments, municipal corporations, and/or local independent school boards are "persons" subject to liability under § 1983. Id. at 635. The holding however only overruled Monroe v. Pape, 365 U.S. 167 (1967), insofar as it had completely immunized municipalities from suit under § 1983. Id. at 619. The Supreme Court explicitly noted that its decision did

not affect the status of governmental units which are considered part of the State for Eleventh Amendment purposes. Id. at 635 n. 54. The Fifth Circuit in Bogard v. Cook, 586 F.2d 399, 410 (5th Cir. 1978) recently affirmed this reading of Monell.

In sum, the BOR as a state agency lacks the status of a "person" within the meaning of § 1983. See Aldredge v. Turlington, TCA 78-0830, Order dated January 25, 1979 (N.D. Fla.)(A copy of this Order was attached to FIU's initial motions to dismiss.) Accordingly, this Court should dismiss the complaint against the BOR for lack of subject matter jurisdiction.

B. Plaintiff Has Failed To Exhaust Her Administrative Remedies

Unless an administrative remedy is inadequate or futile, federal courts generally should not involve themselves in civil rights disputes until such remedies have been exhausted. See generally, Gibson v. Berry Hill, 411 U.S. 564, 36 L.Ed. 2d 488 (1973); McKart v. United States, 395 U.S. 185, 23 L.Ed. 2d 194 (1969); Lane v. Wilson, 307 U.S. 268, 83 L.Ed. 1281 (1939); Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969); Craycroft v. Ferral, 408 F.2d 587 (9th Cir. 1969).

One can find language in Supreme Court decisions which seems to imply that plaintiffs are not required to exhaust administrative remedies prior to filing suit to vindicate their civil rights.

See Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). However, a close analysis of those cases, Id. at 567-569, and a review of later Supreme Court authority, see Gibson v. Berry Hill, supra, reveals that the Supreme Court has only condemned a "wooden application of the exhaustion doctrine in cases under the Civil Rights Act." Eisen v. Eastman, supra, 421 F.2d at 569. As Judge Friedly stated:

> Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate ... or where it is certainly or probably futile .... A quite different situation would be presented, for example, when a complaint alleged that a subordinate state officer had violated the plaintiff's Constitutional rights by acting because of bias ... and the state has provided for a speedy appeal to a higher administrative officer .... We shall need much clearer directions than the [Supreme] Court has yet

> given or, we believe, will give, before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal jurisdiction.

Id. The Fifth Circuit has also required that administrative remedies be exhausted--particularly in school personnel and management problems where there is a governing board as in this case--in order to insure that the alleged grievances are "ripe for adjudication." For example, in Stevenson v. Board of Education of Wheeler County, Georgia, 426 F.2d 1154 (5th Cir. 1970), Judge Bell noted the Supreme Court cases which appear to dispense with the requirement of "exhaustion of administrative remedies" in civil rights actions, but held that exhaustion

was generally necessary to insure institutional finality:

> We do not take these [U.S. Supreme Court] cases to hold, however, that federal courts are to intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication.

426 F.2d at 1157. In the instant case, plaintiff's alleged grievances clearly lack this "institutional finality."

As a Career Service employee, Ms. Patsy has access to several administrative grievance procedures in the State University System. The administrative rules of the Department of Administration Career Service System, Division of Personnel pro-

vide that each Career Service employee or applicant shall be assured of an equal opportunity in all agency employment practices without regard to that person's "race, color, sex, religion, creed, national origin, political opinions or affiliations, or age" except as provided by law. Fla. Admin. Code, Chapter 22A-15.02(1). These rules also provide for a comprehensive complaint, review and appeal procedure for any Career Service employee or applicant who feels he or she has been aggrieved with respect to equal employment opportunity. Id., Chapter 22A-15.05. The Department of Administration also requires each agency to establish written procedures for handling grievances of Career Service employees. Id., Chapter 22A-10.04. As a result of this requirement, the administrative rules of the Department of

Education, Florida International University provide a comprehensive method of handling the grievances of its Career Service employees. Id., Chapter 6C8-4.05. Under these rules, Ms. Patsy could have initiated an adequate and readily available grievance procedure after the denial of any of her applications. Id., Chapter 6C8-4.05(2)(a).

Finally, the BOR has the responsibility of managing and regulating the State University System, Fla. Stat. §§ 20.15, 239.01, 240.001 and 240.042, including its inherent power (through the Chancellor) to implement the University System's non-discrimination and equal employment oportunity. Moreover, the administrative rules of the BOR provide that university presidents and "any other personnel employed in the State University System" shall have

access to the BOR through its Chancellor Florida Admin. Code, Chapter 6C-4.01(6). Thus, plaintiff had this additional avenue of administrative relief available to her.

In sum, if plaintiff was a victim of discrimination, she had several full and adequate administrative remedies in the State University System which she could have pursued. Instead, she has apparently elected to bypass these procedures and prematurely burden this Court with her claims. Plaintiff's failure to present her grievances to the appropriate administrative agencies undermines any possible claim of "institutional finality." Accordingly, for this reason, plaintiff's alleged claims should be dismissed for lack of subject matter jurisdiction.

## II. THIS COURT SHOULD DISMISS THE AMENDED COMPLAINT FOR FAILURE TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED.

### A. Respondeat Superior Fails To Provide Any Adequate Basis For Imposing § 1983 Liability Upon The BOR.

Assuming, arguendo, that the BOR is a "person" under § 1983, the complaint fails to allege an adequate predicate for imposing liability. The complaint alleges the FIU has discriminated against plaintiff and assumes BOR's responsibility for this alleged § 1983 misconduct based on an agency or respondeat superior theory of liability. However, it is clear that respondeat superior fails to provide an adequate basis for imposing § 1983 liability. Monell, supra, 56 L. Ed. 2d at 635-638. In sum, unless plaintiff in good faith can allege that the official policies of the BOR caused the alleged discrimination (See Ch. 6C-5.01 Fla. Admin. Code) or that the BOR

authorized or ratified the alleged misconduct, the § 1983 claims should be dismissed with prejudice. Jones v. City of Memphis Tenn., 586 F.2d 622, 624-625 (6th Cir. 1978); Duchesne v. Sugarman, 566 F.2d 817, 830 (2d Cir. 1977); Kostka v. Hogg, 560 F.2d 37, 39 (1st Cir. 1977); Sims v. Adams, 437 F.2d 829, 832 (5th Cir. 1976)(Court noted with approval that the complaint did not rest on any theory of vicarious liability); Bracey v. Grenoble, 494 F.2d 566, 569-570 (3d Cir. 1974); Jennings v. Davis, 476 F.2d 1271, 1274 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105, 107 (7th Cir. 1971).

B. Plaintiff's "Discrimination" Allegations Are Inadequate To State A Justifiable Claim Upon Which Relief Can Be Granted.

In essence, plaintiff has invited this Court to declare "affirmative action"

policies, which may have affected her, unconstitutional. The Court should view her invitation as defective for several reasons.

The federal government (Department of Health, Education, and Welfare) requires the BOR to maintain an "affirmative action" policy. 45 C.F.R. §§80.3, 80.4, 80.5 (1978). Pursuant to that obligation, FIU administrators must indeed make an "intentional and concerted effort" to seek out and hire qualified members of minority groups. Although in a different context, the U.S. Supreme Court recently sanctioned a university's consideration of a person's minority status in its admissions policies. University of California v. Bakke, 438 U.S. 265, 57 L.Ed. 2d 750 (1978). The constitutionality of affirmative action programs in the employment context is also presently be-

fore the Supreme Court. See Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216 (5th Cir. 1977), cert. granted, 58 L.Ed. 2d 704 (1978). Given the compromise course which Bakke followed, it would seem most unlikely that the Supreme Court will declare employment-related affirmative action programs unconstitutional. In sum, the mere fact that the BOR or FIU has made an affirmative action commitment does not entitle plaintiff to any relief.

Plaintiff complains that she failed to secure various positions for which she applied and was qualified while non-whites and Latins generally fared better. Absent any allegation that the minority members selected for these positions lacked the requisite qualifications, however, plaintiff's discrimination charges lack constitutional significance. The

complaint totally fails to place plaintiff in the position of a "Bakke" or a "Weber". Affirmative action programs are a sanctioned fact of life. Only when race mechanically (e.g., a quota system) serves to favor the objectively unqualified at the expense of the objectively qualified - scores or grades (Bakke) or seniority (Weber) - does discrimination in a constitutional sense allegedly exist. Clearly plaintiff's present complaint does not place her in any category which would entitle her to judicial relief.

In sum, absent any specific allegations that, as to a particular hiring decision, plaintiff was rejected in favor of an unqualified (or even lesser qualified) minority applicant because of race, her complaint, like the recent Sears suit, Sears, Roebuck Co. v. Attorney General of the United States, ____F.Supp ____, 19

EPD ¶9164A (D. DC. 1979), should be viewed merely as a "political essay." While the complaint may provide philosophical grist for the executive or legislative "mills," it does not presently warrant grinding by the federal judiciary.

III. THIS COURT SHOULD REQUIRE PLAINTIFF TO RENDER A MORE DEFINITE STATEMENT OF HER CLAIMS.

Should the Court deny the motions to dismiss or dismiss the complaint with further leave to amend, then the Court, in fairness to the BOR, should require plaintiff to render a more definite statement of her claim. Granted, federal "notice" pleading requirements under Rule 8, Fed. R. Civ. P., are quite liberal. However, several of plaintiff's allegations are so vague or ambiguous that the BOR cannot reasonably frame a responsive pleading.

Plaintiff contends she has worked at FIU since 1972 and has applied for numerous positions consistently without success although many Latins and non-whites were selected. (Complaint ¶¶ 5, 7). In Paragraph 8, she partially lists those positions for which she has unsuccessfully applied. In Paragraphs 11(a), 12, 13 and 16(a), plaintiff makes conclusory sex and/or race discrimination allegations. A more definite statement of her claims should remedy the following ambiguities and questions before the BOR must respond:

Sex discrimination - Other than her conclusory allegations in Paragraphs 11(a) and 16(a), the complaint fails to indicate when or where plaintiff allegedly suffered sex discrimination. Indeed, sex discrimination charges appear to have no relationship to her grievances.

Racial Discrimination - The complaint does not indicate which particular hiring decisions were allegedly improper. Every position for which plaintiff applied? Only those positions in Paragraph 8? Every position for which plaintiff applied and a minority member was selected? In sum, what specific hiring decisions does plaintiff desire this Court to examine for alleged impermissible minority preferences, and when did they occur?

As to each specific challenged hiring decision, why is it allegedly discriminatory? Did the minority member selected allegedly lack the requisite qualifications? Did plaintiff allegedly possess superior qualifications?

The elimination of these ambiguities in the complaint would minimize expensive and time-consuming discovery. In sum, plaintiff has launched an across-the-board

attack on FUI's affirmative action programs which may have affected her. All the BOR requests is for plaintiff to identify which employment decisions it must defend and why. Since this request only slightly inconveniences plaintiff, the BOR respectfully submits that the potential savings in terms of discovery time and expense attest to the reasonableness and fairness of a more definite statement.

## CONCLUSION

The federal government and most state governments have woven "affirmative action" into the political and economic fabric of this country. Plaintiff's ambiguous "reverse discrimination" complaint provides inadequate justifications for this Court to examine whether FIU's required affirmative action efforts have

violated her constitutional rights. She has prematurely chosen to burden this Court with legally defective allegations. Adequate administrative remedies and, suitable judicial vehicles for securing any necessary equitable and legal relief certainly exist. Pending her pursuit of either administrative or appropriate legal remedies, this Court should not accept her defective invitation to scrutinize personnel decisions for alleged constitutional infirmities. For all the preceding reasons, defendant BOR respectfully requests this Honorable Court to dismiss the amended complaint. Alternatively, the BOR respectfully requests a more definite statement of plaintiff's claims.

Respectfully submitted,

GUY O. FARMER II
JEFFREY H. KLINK
Mahoney, Hadlow & Adams
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

JOHN W. KOZYAK
Mahoney, Hadlow & Adams
1401 First Federal Building
One Southeast 3rd Avenue
Miami, Florida 33131
(305) 358-5550

By /s/
Jeffrey H. Klink

[CAPTION]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Plaintiff herein files this memorandum of law in opposition to the motion to dismiss amended complaint and memorandum of law in support thereof filed on behalf of the Defendant, BOARD OF REGENTS, hereinafter referred to as BOARD.

Initially, it should be noted that:

> "On a motion to dismiss, material allegations of the complaint are taken as admitted, and the complaint is to be liberally construed in favor of the plaintiff. Jenkins v. McKeithen, 395, U.S. 411, 421 n.89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969)." Kennedy v. H & M Lading, Inc., 529 F.2d 987 (9th Cir. 1976).

In addition:

> "Ordinarily a motion to dismiss should be disfavored and doubt should be resolved in favor of the pleader." Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976).

It has also been held that a case brought under Section 1983, Title 42 U.S.C., should be not dismissed at the pleading

stage unless it appears to a certainty that the Plaintiff would be entitled to no relief under any state of facts which could be proven in support of his claim. Conley v. Gibson, 355 U.S. 41 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); and Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968).

IS THE BOARD OF REGENTS A "PERSON" WITHIN THE MEANING OF 42 U.S.C., SECTION 1983

Florida Statute, Section 240.042 creates the BOARD OF REGENTS as follows:

> "(1) The Board of Regents is hereby created as a body corporate, and shall have a corporate seal; shall elect a corporate secretary; shall have and employ a staff attorney and all other necessary personnel; shall have power to contract and be contracted with; to sue and be sued; to plead and be impleaded in all courts of law and equity; . . ." (Emphasis supplied).

The Legislature of the State of Florida, in their wisdom, has seen to it that the BOARD OF REGENTS of the State of Florida is an entity subject to the jurisdiction of this Court and properly named as a party defendant in this action. It has been recognized in Byron v. University of Florida, 403 F.Supp. 49 (N.D. Fla. 1975) that:

> " . . . under Florida law the University is not endowed with separate corporate existence, nor with the authority to be sued in its own name. Rather those characteristics are bestowed upon the Board of Regents, as need of the State's University System." (Emphasis supplied).

Likewise in Wolfe v. O'Neill, 336 F.Supp. 1255 (D.Alaska 1972) and Craig v. Alabama State University, 451 F.Supp. 1207 (M.D. Ala. 1978), it was held that the Board of Regents and a Board of Trustees were "persons" within the mean-

ing of the 1871 Civil Rights Statute (42 U.S.C., §1983).

Clearly, based upon the above and foregoing authorities in the State of Florida, the BOARD OF REGENTS is an entity properly before this Court.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Defendant has claimed that the complaint herein be dismissed for the failure of the Plaintiff to have availed herself of and/or exhaust certain alleged administrative remedies to undue the grievous wrong inflicted upon her.

It is the law from the Supreme Court of the United States and from the Fifth Circuit that exhaustion of neither State administrative nor State judicial remedies are required prior to bringing an action pursuant to 42 U.S.C., §1983. Chief Judge Brown in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), Judge Wisdom in Moreno

v. Henckel, 431 F.2d 1299 (5th Cir. 1970) and Judge Goldberg in Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971), speaking for their respective panels, all concluded that one of the purposes underlying 42 U.S.C., §1983 is to provided a remedy in Federal court which is supplementary to any remedy in State proceedings. See also, Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827 (1973); Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972) and McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433 (1973).

Based upon the above and foregoing authorities, neither exhaustion of state nor judicial remedies were required as a prerequisite to bringing the action in this Court.

RESPONDEAT SUPERIOR

Defendant claims unequivocally "that respondeat superior fails to provide an adequate basis for imposing Section 1983 liability." The law is not as clear, especially in the Fifth Circuit as the Defendant suggests:

> "Moreover, assertions of insulation from liability because §1983 does not permit derivative, respondeat superior, liability are questionable, and, at best, overbroad. It is true that some cases hold that absent overt acts, §1983 does not authorize recovery of monetary damages through respondeat superior, see, e.g., Johnson v. Glick, 2 Cir. 1973, 481 F.2d 1028; Adams v. Pate, 7 Cir. 1971, 445 F.2d 105, but this circuit has carved out some exceptions to this rule. A sheriff may be held liable for the actions of his appointed deputies, over whom he has control, in certain circumstances. See e.g., Madison v. Gerstein, 5 Cir. 1971, 440 F.2d 338. Even more to the point this court has established in several fairly recent cases that 'prison administrators may under certain circumstances be held vi-

> cariously liable for the act of their subordinates'. See Carter v. Estelle, 5 Cir. 1975, 159 F.2d 1136; Holland v. Connors, 5 Cir. 1974, 491 F.2d 539; Parker v. McKeithen, 5 Cir. 1974, 488 F.2d 553, cert. denied, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed. 2d 65; Tuley v. Heyd, 5 Cir. 1973, 482 F.2d 590. At this stage, it is impossible to determine whether or not Taylor's broad allegations will support derivative liability under a respondeat superior theory." Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976).

See, in addition, Croy v. Skinner, 410 F.Supp. 117, 123 (N.D. Ga. 1976). Some courts have rejected the limitation upon liability urged by the defendants altogether. See Santiago v. City of Philadelphia, 435 F.Supp. 136, 148-49 (E.D. Pa. 1977). The Fifth Circuit has also had this to say about the matter: "On usual principles of agency persons may be held accountable for the acts of others under §1983." Gomez v. Florida

State Employment Service, 417, F,2d 569, 578 n.34 (5th Cir. 1969).

Additionally, the Defendant in the memorandum of law filed with this Court claims that Plaintiff is asking this Court to declare "affirmative action policies" unconstitutional. The Defendant then goes on to try and justify the alleged discriminatory conduct on the part of the Plaintiff under the mandate of governmental affirmative action programs. Nowhere, in Plaintiff's complaint are Defendant's "affirmative action programs" even discussed, assuming they exist and in any event, Defendant is arguing matters before this Court which are outside of the face of the complaint, that argument being improper on a motion to dismiss.

WHEREFORE, counsel prays this Honorable Court to deny the motion to dismiss filed herein, to find that the complaint

sufficiently sets forth allegations to enable Defendant to plead and to allow this action to proceed accordingly.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorneys for Plaintiff
100 North Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132
Telephone: (371-3477)

By: /s/
DENIS DEAN, SR.

[CAPTION]

ORDER

THIS CAUSE having come before the Court on Defendant's motion to dismiss for lack of jurisdiction for plaintiff's failure to allege exhaustion of administrative remedies under principles enunciated by Penn v. Schlesinger 497 F.2d 970 (5th Cir. 1974), and having considered the motion and being otherwise duly advised,

It is thereupon

ORDERED AND ADJUDGED that Defendant's motion to dismiss be granted for Plaintiff's failure to exhaust administrative remedies.

DONE AND ORDERED at Miami, Florida, this 9th of July, 1979.

JOSE A. GONZALEZ
UNITED STATES DISTRICT JUDGE